

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MERCEDES MARKER,
Plaintiff,

v.

CITY OF SAN JOSE and SON VU,
Defendants.

Case No. C-09-05956-RMW

**ORDER ON ADDITIONAL MOTIONS
IN LIMINE**

[Re: Docket Nos. 100, 111]

I. DEFENDANTS' *IN LIMINE* MOTION

Motion in Limine No. 4: To preclude prior “bad acts” evidence relating to Office Vu.

GRANTED. The evidence is not relevant. Fed. R. Evid. 401. Even if some inference that Vu’s testimony is likely to be biased in favor of the City because he is being paid while on administrative leave (as opposed to being fired or suspended without pay) pending resolution of his involvement with marijuana could be drawn, the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice and by the waste of time that would be involved in presenting the evidence. Fed. R. Evid. 403.

1 **II. PLAINTIFF’S *IN LIMINE* MOTION**

2 **Motion In Limine No. 6: To exclude evidence or argument that Hampsmire was arrested by a**
 3 **private citizen.**

4 GRANTED. The evidence does not support a citizen’s arrest theory. Defendants throughout
 5 this litigation have asserted that Officer Hisquierdo arrested Hampsmire and Officer Vu acted as
 6 Officer Hisquierdo’s “cover” during the arrest.

7 On February 3, 2014, at a pretrial conference, defendants first placed plaintiff on alert that
 8 they might raise a theory of citizen’s arrest – i.e. that the officers made an arrest pursuant to a
 9 citizen’s complaint and thus the Hampsmire arrest was not unlawful. Defendants then filed a
 10 proposed jury instruction related to citizen’s arrest, Dkt. No. 99, and plaintiff filed the instant
 11 motion *in limine*, Dkt. No. 100.

12 Under California’s citizen’s arrest law, a private person may arrest another for a public
 13 offense committed in his presence. *See* Cal. Pen. Code § 837. Officers may arrest a suspect on
 14 behalf of a private person if the private person committing the citizen’s arrest declares his intention
 15 to arrest the suspect and then delegates to the officers his right to take the suspect into physical
 16 custody. *People v. Johnson*, 123 Cal. App. 3d 495, 499 (1981) (“It is well established that a citizen
 17 in whose presence a misdemeanor has been attempted or committed may effect a citizen’s arrest and
 18 in so doing may both summon the police to his aid and delegate to police the physical act of taking
 19 the offender into custody.”). Typically this express delegation of arresting authority is memorialized
 20 through a signed citizen’s arrest form or statement. *See e.g., Johanson v. Dep’t of Motor Vehicles*,
 21 36 Cal. App. 4th 1209, 1213 (1995) (“[Citizen arrestor] signed a citizen’s arrest form that indicated
 22 he was arresting [suspect] for malicious mischief and vandalism.”); *Atkins v. County of Alameda*,
 23 No. C-03-3566, 2006 WL 1600651 at *3 (N.D. Cal. June 7, 2006) (“[Citizen arrestors] both filled
 24 out and signed citizen arrest statements.”); *Hampsmire v. City of Santa Cruz*, 899 F. Supp. 2d 922,
 25 927-28 (N.D. Cal. 2012) (“Police dispatch . . . informed Officer Bayani that the reporting party
 26 wanted to sign a formal complaint. . . The reporting party signed a citation against plaintiff for a
 27 [municipal] violation. . . [Then] Officer Bayani returned to plaintiff’s location to get his identifying
 28 information and issue the citation.”).

1 In the absence of a citizen's arrest statement, a citizen's arrest may be reasonably inferred
 2 from the circumstances and evidence. *See People v. Harris*, 256 Cal. App. 2d 455, 459 (1967).
 3 "[T]he delegation of the physical act of arrest need not be express, but may be implied from the
 4 citizen's act of summoning an officer, reporting the offense, and pointing out the suspect." *Padilla*
 5 *v. Meese*, 184 Cal. App. 3d 1022, 1030 (1986) (citing *People v. Johnson*, 123 Cal. App. 3d 495, 499
 6 (1981)).

7 Here, there is insufficient evidence that any citizen actually delegated the act of arrest to the
 8 officers or that the officers understood that they were effectuating a citizen's arrest. Officers
 9 Hisquierdo and Vu both stated that Officer Hisquierdo performed the arrest while Officer Vu acted
 10 as "cover." *See* Declaration of Jose Hisquierdo in Support of Defendant's Opposition to Plaintiff's
 11 Motion for Summary Judgment, Dkt. No. 41, ¶ 5 ("Officer Vu was acting as my 'cover,' his role
 12 was to protect me from any actual or potential threats while I was conducting the arrest.");
 13 Declaration of Son Vu in Support of Defendant's Opposition to Plaintiff's Motion for Summary
 14 Judgment, Dkt. No. 40, ¶ 6 ("My role was to act as 'cover,' to protect Officer Hisquierdo from any
 15 actual or potential threats while he was conducting the arrest."). Both Officer Vu's and the City of
 16 San Jose's interrogatory responses reiterate the arrest-and-cover story. *See* Dkt. No. 100-1 (Millen
 17 Decl. Ex. 1), Vu Interrogatory Response, at 3; Dkt. No. 100-1 (Millen Decl. Ex. 2), City of San Jose
 18 Interrogatory Response at 4. Finally, in the officers' official reports, references are made to victims,
 19 witnesses and witness statements, but no reference is made to a citizen arrestor. *See* Amended
 20 Declaration of Richard D. North in Support of Defendants' Opposition to Plaintiff's Motion in
 21 Limine #6, Dkt. No. 105, Ex. A ("North Ex. A").

22 The facts here are that a party reported a disturbance; police were dispatched to investigate;
 23 witness statements reporting the commission of a misdemeanor were taken; and then the officers on
 24 the scene arrested the suspect. Defendants cite in support their claim of a citizen's arrest two
 25 statements from witnesses saying "[Hampsmire] should be put in jail!" and, "[Hampsmire] should
 26 get a 'cot' and three square meals," presumably meaning be put in jail. North Ex. A. Finding an
 27 implied citizen's arrest from such statements would be a distortion of the law. The statements show
 28 no intention by the citizens to have the police arrest Hampsmire *under the citizen's authority*. At

1 most, the statements are suggestions about what the officers should do with Hampsmire under their
2 own authority. Accordingly, the motion *in limine* to exclude testimony or argument that Officer
3 Hisquierdo was making a citizen's arrest is GRANTED.

4
5 **IT IS SO ORDERED.**

6
7 Dated: August 13, 2014

8 
9 RONALD M. WHYTE
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28